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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB ANTONIO MARTINEZ,

Defendant and Appellant.

E072020

(Super.Ct.No. RIF154562)

OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge.  
Affirmed.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and  
Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Jacob Antonio Martinez was charged by amended information with attempted murder (Pen. Code<sup>1</sup>, §§ 664, 187, count 1), assault with a deadly weapon (§ 245, subd. (a)(1)), participation in a criminal street gang (§ 186.22, subd. (a), counts 3 & 6), being a felon in possession of a firearm (§ 12021, subd. (a)(1), count 4), and possession of a sawed-off shotgun (§ 12020, sub. (a)(1), count 5). As to counts 1 and 2, the amended information also alleged that defendant personally inflicted great bodily injury (GBI) (§§ 12022.7, subd. (a) & 1192.7, subd. (c)(8)), and that he committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)). As to count 1, it further alleged that he personally used a deadly and dangerous weapon. (§§ 12022, subd. (b)(1) & 1192.7, subd. (c)(23).) The amended information also alleged that defendant had one prior strike conviction. (§§ 667, subds. (c), (e) & 1170.12, subd. (c)(1).) A jury found him guilty of counts 2 through 6 and found true the gang and GBI enhancements as to count 2. The jury was unable to reach a verdict on count 1. (See *People v. Martinez* (Jan. 23, 2012, E052705) [nonpub. opn.]<sup>2</sup>)

A trial court dismissed count 1, found true the prior strike allegation, and sentenced defendant to a total of 23 years in state prison. As to count 2, the court imposed six years, plus three years on the GBI enhancement and 10 years on the gang

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

<sup>2</sup> We granted defendant's request for judicial notice filed on May 2, 2019, and took judicial notice of our unpublished opinion in case No. E052705.

enhancement. As to counts 3, 4, and 6, the court imposed consecutive terms of 16 months on each count. The court stayed the sentence on count 5 pursuant to section 654. Pursuant to this court's decision in *People v. Martinez, supra*, E052705, the court stayed the sentences on counts 3 and 6 under section 654 and amended the abstract of judgment to reflect that those counts were not violent offenses under section 667.5, subdivision (c). Subsequently, the court struck the sentence on the GBI enhancement on count 2 in light of section 1170, subdivision (d), *People v. Gonzalez* (2009) 178 Cal.App.4th 1325, 1332 (*Gonzalez*), and *People v. Rodriguez* (2009) 47 Cal.4th 501, 509 (*Rodriguez*), thereby reducing defendant's sentence by three years. However, it denied defendant's request to modify the sentence on the gang enhancement to five years, since the substantive offense in count 2 remained a violent felony. The court specifically concluded that its decision to strike the punishment on the GBI enhancement did not change the fact that the jury found the GBI allegation true.

Defendant filed a timely notice of appeal. We affirm.

### PROCEDURAL BACKGROUND<sup>3</sup>

On July 16, 2018, the Office of the Secretary of the Department of Corrections and Rehabilitation (the Secretary) recommended that the court resentence defendant pursuant to section 1170, subdivision (d) and *Gonzalez, supra*, 178 Cal.App.4th 1325. Section

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<sup>3</sup> The facts of the case are not at issue, since defendant is appealing the resentencing under section 1170, subdivision (d).

1170, subdivision (d), provides that, upon the recommendation of the Secretary, the court may recall a previously ordered sentence and resentence a defendant “in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.” (§ 1170, subd. (d)(1).) The court “may reduce a defendant’s term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice.” (*Ibid.*) The Secretary noted that in *Gonzalez*, the court held that the trial court should not have imposed enhancements under both sections 12022.7, subdivision (a), and 186.22, subdivision (b)(1)(C), since both sentence enhancements were based on the GBI the defendant caused while committing the underlying offense.

Prior to the resentencing hearing here, defense counsel filed a written request that the court strike the gang enhancement and maintain the GBI enhancement. At the resentencing hearing, the court indicated that it would strike the GBI enhancement and maintain the gang enhancement, thereby reducing defendant’s sentence by three years. Defense counsel requested that the court modify the sentence further, contending that since defendant was no longer being sentenced on the GBI enhancement, the underlying assault offense was no longer a “violent felony,” within the meaning of section 186.22, subdivision (b)(1)(C). The court disagreed, noting that just because *Rodriguez, supra*, 47 Cal.4th 501 (upon which the decision in *Gonzalez* was based) suggested the court could not impose sentences on both enhancements, it “[did not] change the fact that the jury finding [the GBI] allegation true makes it a serious and violent felony.” The court found

the underlying offense here to still be a serious and violent felony; thus, the enhancement was properly 10 years under section 186.22. The court stated that it was reducing defendant's sentence by three years and declined to change the sentence under section 186.22.

### DISCUSSION

Defendant appealed and, upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and two potential arguable issues: (1) whether an offense made a violent felony by virtue of a true finding on a GBI enhancement remains a violent felony when the court strikes the punishment on the GBI enhancement; and (2) whether the court erred in imposing 10 years, rather than five years, on the gang enhancement, when the punishment for the GBI enhancement is stricken, in light of *Gonzalez, supra*, 178 Cal.App.4th 1325, 1332. Counsel has also requested this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, which he has not done.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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McKINSTER  
Acting P. J.

We concur:

CODRINGTON  
J.

MENETREZ  
J.